No. 289.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

WILLIS THORP,

Plaintiff in Error,

vs.

S. A. BONNIFIELD AND JOHN G. HEID,

Defendants in Error.

Brief for Defendant in Error, John G. Heid.

RICHARD C. HARRISON,
Attorney for Defendant in Error, John G. Heid.

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I.

Before the questions discussed by counsel for plaintiff in error can be considered at all, the preliminary question whether this Court has jurisdiction to consider them must first be determined, and must be determined in the affirmative. The answer to this preliminary question depends upon the character of the questions upon which this Court is asked to pass, and, in order to ascertain what those questions are, it will be necessary, first of all, to determine how much of the printed transcript of record on file in this Court is record, and how much of it is matter which the Court must disregard and ignore.

Paragraph 1, of Rule 14 of the Rules of this Court. prescribes that:—

"The Clerk of the Court to which any writ of error may be directed shall make a return of the same by transmitting a true copy of (1) the record, (2) opinion or opinions of the Court, (3) bill of exceptions, (4) assignment of errors, and (5) all proceedings in the case, under his hand and the seal of the Court."

In addition to these papers, which alone constitute the record in this Court, the Clerk of the Court below in all cases

"shall annex to and transmit *with the record* the original writ of error and citation, or citation issued in the cause, if an equity case, and a certificate under seal stating the cost of the record and by whom paid."

Rule 14, Paragraph 2.

"The record" referred to in paragraph 1 of Rule 14 is the judgment roll. In determining what constitutes the judgment roll in a case in the District Court for Alaska, reference must be had to the Oregon Code of Civil Procedure, enacted Oct. 11, 1862, and in force on May 17, 1884. (See 23 U. S. Stat. at Large, 25.) Section 269 of that code reads as follows:

"After docketing the judgment, and before the next regular term of the court, the clerk shall prepare and file in his office the judgment roll as provided in this section:

1. If the complaint has not been answered by any defendant, he shall attach together in the order of their filing, issuing, and entry, the complaint, summons, and proof of service, and a copy of the entry of judgment.

2. In all other cases, he shall attach together in like manner the summons and proof of service, the pleadings, bill of exceptions, all orders relating to change of parties, together with a copy of the entry of judgment, and all other journal entries or orders in any way involving the merits and necessarily affecting the judgment."

The matters constituting the judgment roll in this case, including all the journal entries and orders in the case, without reference to whether they involve the merits or affect the judgment, occupy in the printed transcript of record pages 1 to 16 inclusive, pages 21 to 24, 25, 68, 69, 96, 104, 105, 112, 130, and pages 132 to 141 inclusive. The opinion of the District Court and the assignment of errors occupy respectively pages 54 to 67 inclusive, and pages 101 to 103 inclusive. The bill of exceptions is included in the judgment roll, occupying pages 132 to 141 inclusive. The other "proceedings in the case," giving to that phrase the largest possible construction, occupy pages 17, 20, 24, 41 to 44 inclusive, and pages 72 to 73.

Whatever else there is in the printed transcript of record cannot be considered as any part of the record in this Court, and must, therefore, be disregarded and ignored. Nothing contained in pages 26 to 40 inclusive, 45 to 53 inclusive, 74 to 95 inclusive, or in pages 97, 98, or 113 to 129 inclusive, will be treated by this Court as being before it for consideration in any sense whatever.

An affidavit filed in the case cannot lawfully be included by the Clerk of the District Court in the judgment roll which he makes up, unless incorporated in a bill of exceptions filed in the case. Unless so incorporated it

is not a matter of record, and, even if inserted by the Clerk in the judgment roll, will be disregarded by the Court.

Thompson v. *Backenstos*, 1 Oregon 17;
Osborn v. *Graves*, 11 Oregon 526;
Fisher v. *Kelly*, 29 Oregon 249.

In *Rickey* v. *Ford*, 2 Oregon, 251, a motion was made in the Supreme Court for an order directing the Clerk of the trial court to send to the Supreme Court the depositions and documents used in evidence on the trial of the case. The Court said, in denying the motion (p. 255):

"Those papers have not been made part of the record, and no certificate the Clerk could attach to them would give them that character or enable this Court to look into them in determining the questions that may be disclosed in the trial of the cause on appeal."

Still less can any of the affidavits which appear in the printed transcript in this case be deemed to fall under any of the categories of matters which the Clerk of the District Court is directed, by Paragraph 1 of Rule 14 of the rules of this Court, to include in his return to a writ of error. An affidavit is not a proceeding in the case. It is essentially the act of the affiant who subscribes it, and of no one else. It may be the *basis* of some proceeding in the case, but the affidavit itself can never under any circumstances be a proceeding in the case.

It is elementary law that no appellate tribunal can look beyond the record which is legally before it, and that in passing upon the questions of law presented to it for consideration it must in every case altogether ignore any

matters which may happen to be included in the transcript of record, if they ought not to have been so included.

Harper v. *Minor*, 27 Cal. 107;
Pardy v. *Montgomery*, 77 Cal. 326;
Van Bibber v. *Fields*, 25 Oregon 527;
U. S. v. *Carr*, 10 C. C. A. 80, 82;
Board of Commissioners v. *King*, 15 C. C. A. 93;
Duncan v. *A. T. & S. F. R. R. Co.*, 19 C. C. A. 202.

The bill of exceptions settled and allowed by the Judge of the District Court in this case, occupying pages 132 to 141 of the transcript, recites that certain proceedings were had and certain rulings made, and identifies two written motions which were filed in the case and also the notices thereof which were served upon the plaintiff's attorneys, but does not identify any affidavit or other paper as having been used upon the hearing of either of the said motions, and contains nothing to indicate what showing was made in support of or in opposition to either of said motions.

There appear in the printed transcript certain affidavits, some or all of which may have been used upon the hearing of said motions, but nothing in the bill of exceptions indicates which, if any, of said affidavits are the affidavits referred to in the bill of exceptions. The cases already cited establish, if authority be necessary to establish a proposition so elementary, that this Court cannot look outside of the bill of exceptions for any identification of the affidavits or of the other evidence upon which the lower court based its ruling.

The mere fact that the affidavits appear in the printed transcript will not authorize this Court to consider them for the purpose of inquiring whether they justify the ruling of the District Court.

S. W. Virginia Imp. Co. v. *Frari*, 7 C. C. A. 149; *Duncan* v. *A. T. & S. F. R. R. Co.*, 19 C. C. A. 202.

The questions presented for review in this Court by the record before it are:

1. Does the complaint state a cause of action?

2. Did the District Court for Alaska err in ordering the default of the defendant to be entered, without notice to him, after the time allowed to him within which to answer the complaint had expired?

3. Did the said District Court err in refusing, *upon some showing made to it*, to set aside the default of the defendant?

4. Did the said District Court err in ordering judgment to be entered in favor of the plaintiffs, as prayed for in the complaint?

5. Did the said District Court err in refusing, *upon some showing made to it*, to vacate or set aside the judgment entered against the defendant?

II.

Before these questions can be considered on the merits, a preliminary question presents itself as to whether this Court has jurisdiction to consider such questions upon a writ of error to the District Court for Alaska.

In the case of the *Steamer Coquitlam* v. *United States*,

163 U. S. 346, the Supreme Court of the United States has decided that this Court cannot review the final judgment, or decrees, of the District Court for Alaska, in virtue of its appellate jurisdiction over the District and Circuit Courts mentioned in the Act of March 3, 1891, but that such appellate jurisdiction may be exercised in virtue of the general authority conferred by the fifteenth section of the Act of 1891 upon the Circuit Court of Appeals to review the judgments of the Supreme Court of any Territory assigned to such circuit by the Supreme Court. If the jurisdiction of this Court to review the final judgments of the District Court of the United States for the District of Alaska rests solely upon the fifteenth section of the Act of March 3, 1891, then its jurisdiction to review such judgments is limited to cases in which the jurisdiction of the District Court of the United States for the District of Alaska was dependent entirely upon the opposite parties to the suit, or controversy, being aliens and citizens of the United States, or citizens of different States, and to cases arising under the patent laws, under the revenue laws, and under the criminal laws, and to admiralty cases.

The jurisdiction of the District Court of the United States for the District of Alaska was not in this case, and, in fact, is never in any case, dependent entirely, or at all, upon the opposite parties to the suit, or controversy before it, being aliens and citizens of the United States, or citizens of different States, because said District Court is a court of general jurisdiction. Nor is any question presented for review by the record in this case which arises under any patent law, or under any revenue law, or under

any criminal law, or is this an admiralty case. It follows that this Court has no jurisdiction to consider any of the questions discussed by counsel for plaintiff in error, and must dismiss the writ of error in this case.

III.

If this Court had jurisdiction to consider the questions presented by the record in this case, still it would find no ground for reversing the judgment.

1. The complaint states a cause of action. Counsel admit that it states a cause of action in favor of Bonnifield. This was enough to justify overruling the demurrer. And, as for the point discussed by counsel in their brief, it would violate all rules of pleading to hold that the unqualified allegation in the complaint, that Runkle and Bonnifield assigned to Heid, for a good and valuable consideration, an undivided one-eighth interest in the lease referred to in the complaint, could be controlled by a recital in an exhibit, sufficiently identified, it is true, to be made part of the complaint as an exhibit, but not so as to give to any clause contained in the exhibit the effect of an allegation of the complaint. (*Lambert* v. *Haskell*, 80 Cal. 611; *Burkett* v. *Griffith*, 90 Cal. 532, 541.)

2. That the default of a defendant may be entered without notice to him, is hardly a debatable proposition. The Court could not have refused to order the default to be entered, except upon the ground that it was the duty of the Clerk, upon the written request of counsel, and without any order to that effect being made by the Court, to enter the default of the defendant, and thereupon to enter judgment for the amount specified in the summons.

(*Graydon* v. *Thomas*, 3 Oregon, 250.) Section 246 of the Oregon Code of Civil Procedure (Hill's Annotated Laws of Oregon, p. 331), reads:

"Judgment may be had upon failure to answer, as follows:

"When the time for answering the complaint has expired, and it appears that the defendant * * * has been duly served with summons, and has failed to answer the complaint, the plaintiff shall be entitled to have judgment against such defendant, * * *

"1. In an action arising upon contract for the recovery of money or damages only; if no answer has been filed with the Clerk of the Court within the time specified in the summons, *or such further time as may have been granted by the Court or Judge thereof*, the Clerk, upon the application of the plaintiff made in writing and filed with the Clerk, shall enter the default of the defendant, and immediately thereafter enter judgment for the amount specified in the summons, including the costs of the defendant."

The defendant's attorney having been present in Court when the order was made, overruling the demurrer to the complaint, and granting the defendant further time, until December 23, 1895, to answer, was not entitled to any other notice. (*Barron* v. *Delavel*, 58 Cal. 95.)

3. There is nothing in the record to show upon what showing the District Court refused to vacate the default. It will be presumed in support of the judgment that the showing made was such as to justify the ruling. Even if the affidavits which appear in the printed transcript

could be considered as the same affidavits which are referred to in the bill of exceptions, still there is nothing in the record before this Court to indicate that they were only affidavits before the District Court, or constituted the whole of the evidence upon which it acted.

4. The contention of counsel for plaintiff in error that evidence should have been taken by the District Court in support of the allegations of the complaint before rendering judgment, would have some force if this had been a case in equity. As it was an action at law and as the default of the defendant had been entered and not set aside, the District Court could not have refused to render judgment for the amount to which the complaint showed the plaintiffs to be entitled.

Respectfully sumbitted,

RICHARD C. HARRISON,

For Defendant in Error, John G. Heid.